

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GERALD BLACK,

Petitioner,

No. C 05-0250 PJH (PR)

vs.

**ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS**

MICHAEL S. EVANS, Warden,

Respondent.

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities, and has lodged exhibits with the court. Petitioner has not filed a traverse. For the reasons set out below, the petition is denied.

BACKGROUND

Petitioner was convicted by a jury of battery by a prisoner on a non-confined person See Cal. Penal Code § 4501.5. He received a sentence of twenty-five years to life pursuant to the Three Strikes law. See Cal. Penal Code § 1170.12. He does not dispute the following facts, which are excerpted from the opinion of the California Court of Appeal:

Alexandra Simons testified that she was employed as a medical technical assistant (MTA) by Salinas Valley State Prison. Defendant's attorney stipulated that defendant was an inmate at the prison. Simons indicated that she was a licensed vocational nurse and her position involved providing medical care to inmate. On August 7, 2000, she had been working at the prison as a MTA for two months.

Simons indicated that, on August 7, 2000, a correctional officer brought inmate Gerald Black, identified in court as defendant, to a chair where "pre-vitals," vital signs such as weight and blood pressure, were taken. Simons stated that she was wearing a standard issue, tan colored "California

1 Department of Corrections medical smock." Defendant sat in a chair facing
2 Simons, who was also seated, across a desk. He laid out his left arm for
3 Simons to take his blood pressure. Simons stated that she put a blood-
4 pressure cuff on defendant's upper left arm and placed her stethoscope on
5 the inside of his elbow. According to Simons, as she was administering the
6 blood pressure and heart beat checks, which takes a total of a minute or two,
7 Simon's torso and defendant's torso were about his arm's length apart and no
8 part of Simon's body was touching defendant's arm.

9 Simons testified that, at some point during this procedure, defendant
10 extended his hand forward and his left thumb and his forefinger contacted her
11 left breast for a second. Simons thought that defendant had moved his hand
12 about six inches forward to make contact with her breast. She stated that she
13 moved back in reaction because she was uncomfortable. She testified that
14 she stood up because she was done with the procedure and because she
15 "was a little shocked." She stated that as she "went to get up [defendant]
16 grabbed again and got the edge of [her] smock." Simons indicated that she
17 felt offended and a little nervous. Simons testified that she did not bump into
18 him, there was no possible way the touching could have been an accident,
19 she believed the touching was intentional, and it was her opinion that
20 defendant moved his hand on purpose in order to touch her. She confirmed
21 that the incident occurred within the state prison.

22 Simons testified that she immediately reported the incident to the
23 correctional officer assisting her. She recalled that, during a subsequent
24 contact with defendant in the prison, defendant told her that he and his
25 attorney would make her look really bad and she should not testify against
26 him.

27 Defendant testified on his own behalf. He claimed that his left arm was
28 restrained and he did not touch Simon's breast. However, he admitted that
his hand accidentally came in contact with her left breast and explained that it
happened because "[h]er breasts was [sic] out far enough in the smock she
was wearing where [his] hand –" "[a]ccidentally touched her."

Defendant confirmed that it was his testimony that the touching of
Simon's breast was an accident. Defendant recalled that Simons "extended
herself towards [his] hand" and "[h]er chest was sticking out this far when she
was leaning over to do the blood pressure." His testimony was that his palm
was lying flat the entire time and that his palm and thumb never moved.

Defendant completely denied grabbing the smock. When asked why
Simons would say that he grabbed her smock, defendant replied that he felt
that "she [had] been coached to say what she want [sic] to say up on the
stand."

Defendant acknowledged that he was in custody in Salinas Valley
State Prison for sales of cocaine base and had twice before served time in
prison for assault with intent to commit rape. He agreed that those assaults
were not accidental.

Defendant indicated again that Simons was mistaken in her belief that
he intentionally grabbed her breast. He further testified that Simons was
actually lying when she claimed he grabbed her smock and lying when she
suggested that he tried to intimidate her subsequent to the August 7 incident.

1 He stated that there had been no contact between them since the incident.
2 Resp't Ex. 6 (Cal. Ct. of Appeal Op.) at 2-3.

3 STANDARD OF REVIEW

4 This court may entertain a petition for a writ of habeas corpus "in behalf of a person
5 in custody pursuant to the judgment of a State court only on the ground that he is in
6 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
7 2254(a).

8 The writ may not be granted with respect to any claim that was adjudicated on the
9 merits in state court unless the state court's adjudication of the claim: "(1) resulted in a
10 decision that was contrary to, or involved an unreasonable application of, clearly
11 established Federal law, as determined by the Supreme Court of the United States; or (2)
12 resulted in a decision that was based on an unreasonable determination of the facts in light
13 of the evidence presented in the State court proceeding." *Id.* § 2254(d). The first prong
14 applies both to questions of law and to mixed questions of law and fact, *Williams (Terry) v.*
15 *Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on
16 factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

17 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state
18 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question
19 of law or if the state court decides a case differently than [the] Court has on a set of
20 materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412-13. "Under the
21 'unreasonable application clause,' a federal habeas court may grant the writ if the state
22 court identifies the correct governing legal principle from [the] Court's decisions but
23 unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The
24 federal court on habeas review may not issue the writ "simply because that court concludes
25 in its independent judgment that the relevant state-court decision applied clearly
26 established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must
27 be "objectively unreasonable" to support granting the writ. *Id.* at 409.

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Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. at 340.

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion. See *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000).

DISCUSSION

As grounds for habeas relief, petitioner asserts that: (1) the trial court's failure to instruct the jury that accident is a defense to battery by a prisoner violated his due process rights; (2) the trial court's failure to give a unanimity instruction violated his due process rights; (3) the evidence was insufficient to prove that he was confined in a California state prison at the time of the offense; (4) he was denied due process because the court failed to advise him of his right to confrontation and against self-incrimination before accepting his stipulation to his two prior strike convictions; (5) his sentence constitutes cruel and unusual punishment; and (6) the state's omission of the written jury instructions from the appellate record deprived him of his right to appeal and to effective assistance of appellate counsel.

I. Failure to Give Accident Instruction

Petitioner claims that the trial court's failure to instruct the jury that accident is a defense to battery by a prisoner violated his due process rights. He argues that the trial court should have instructed the jury pursuant to CALJIC No. 4.45, which provides:

When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [] [criminal intent []or purpose,] [] [he] [she] does not thereby commit a crime.

Failure to instruct on the defense theory of the case violates due process if "the theory is legally sound and evidence in the case makes it applicable." *Clark v. Brown*, 450 F.3d 898, 904-05 (9th Cir. 2006) (quoting *Beardslee v. Woodford*, 358 F.3d 560, 577 (9th Cir. 2004)). However, a state trial court's refusal to give a jury instruction does not alone raise a cognizable ground for relief in a federal habeas corpus proceeding. *Dunckhurst v.*

1 *Deeds*, 859 F.2d 110, 114 (9th Cir. 1988) (citation omitted). The error "must so infect the
2 entire trial that the defendant was deprived of his right to a fair trial guaranteed by the due
3 process clause of the fourteenth amendment." *Id.* Whether a constitutional violation has
4 occurred depends on the evidence in the case and the overall instructions given to the jury.
5 *Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995). A defendant is not entitled to have
6 jury instructions raised in his or her precise terms where the given instructions "adequately
7 cover" the defense theory. *United States v. Del Muro*, 87 F.3d 1078, 1081 (9th Cir. 1996);
8 *see also United States v. Tsinnijinnie*, 601 F.2d 1035, 1040 (9th Cir. 1979).

9 "An omission, or an incomplete instruction, is less likely to be prejudicial than a
10 misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). Thus, the
11 burden on a habeas petitioner is "especially heavy" where, as here, the alleged error
12 involves the failure to give a particular instruction. *Id.*

13 If constitutional error is found, the court must also determine that the error "'had
14 substantial and injurious effect or influence in determining the jury's verdict'" before granting
15 habeas relief. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v.*
16 *United States*, 328 U.S. 750, 776 (1946)). In other words, the error must have resulted in
17 "actual prejudice." *Id.*

18 The California Court of Appeal found that the trial court erred in failing to instruct the
19 jury regarding the defense of accident. Resp't Ex. 6 at 5. It also found, however, that the
20 error was harmless, for the trial court properly gave three other instructions which
21 compensated for the omission of CALJIC No. 4.45. *Id.* at 4-6. First, the trial court
22 instructed the jury that in order to prove a violation of California Penal Code § 4501.5, the
23 prosecution had to prove four elements: "one, a person used force or violence upon [the
24 victim]; two, the use of force or violence was *willful* and unlawful; three, the person who
25 used force or violence was at the time confined in a state prison of this state; and number
26 four, the person upon whom the force or violence was inflicted was not at the time confined
27 within that prison." Resp't Ex. 2 (Reporter's Transcript) at 259 (*italics added*). Next, the
28 trial court defined the word "willfully" for the jury as follows: "The word willfully when applied

1 to the intent with which an act is done or omitted means with a purpose or willingness to
2 commit the act or to make the omission in question." *Id.* at 260. Finally, the trial court
3 instructed the jury that a violation of § 4501.5 requires "a joint union or operation of act or
4 conduct and general criminal intent." *Id.* It continued: "General intent does not require an
5 intent to violate the law. When a person intentionally does that which the law declares to
6 be a crime, they are acting with general criminal intent even though they may not know that
7 their conduct or act is unlawful." *Id.* Citing the prejudice standards of *Chapman v.*
8 *California*, 386 U.S. 18, 24 (1967), *People v. Watson*, 46 Cal. 2d 818, 836 (1956), and
9 *People v. Seden*, 10 Cal. 3d 703, 721 (1974), the court of appeal concluded that "[t]here
10 was no prejudice to defendant since the evidence supporting a finding of accident was
11 necessarily rejected by the jury when it convicted defendant." Resp't Ex. 6 at 6.

12 Here the state appellate court disposed of the instructional error as harmless under
13 an appropriate standard of review. See *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993)
14 (*Chapman* provides proper harmless error standard for direct appeals of criminal
15 convictions). Therefore, the question is whether the state court's harmless holding
16 was objectively unreasonable. See *Medina v. Hornung*, 386 F.3d 872, 878 (9th Cir. 2004).

17 The court of appeal correctly recognized that the properly given instructions
18 regarding the elements of the crime charged, the definition of willfulness, and the
19 requirement of concurrence of conduct and intent "adequately cover[ed]" the defense
20 theory of the case. See *Del Muro*, 87 F.3d at 1081. From these other instructions, the jury
21 knew that it in order to convict petitioner of the crime of battery by a prisoner, it had to find
22 that petitioner "purpose[ly]" touched the victim. See Resp't Ex. 2 at 260. Because
23 petitioner could not have acted both purposely and accidentally, no reasonable juror could
24 have found the elements of the crime satisfied and credited petitioner's accident argument.
25 It therefore cannot be said that missing instruction "so infect[ed]" the entire trial that the
26 defendant was deprived of his right to a fair trial guaranteed by the due process clause of
27 the fourteenth amendment." See *Dunckhurst*, 859 F.2d at 114.

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1 For these reasons, the court of appeal's harmlessness holding was not objectively
2 unreasonable. See *Medina*, 386 F.3d at 878. Petitioner is not entitled to federal habeas
3 relief on this claim.

4 **II. Failure to Give Unanimity Instruction**

5 Petitioner contends that his due process rights were violated by the trial court's
6 failure to instruct the jury that under California law all jurors must unanimously agree on the
7 particular criminal act they believe the defendant committed. According to petitioner,
8 because two separate touchings could have constituted the battery, the touching of the
9 breast and the touching of the smock, such an instruction was required.

10 Criminal defendants in state court have no federal constitutional right to a
11 unanimous jury verdict. See *Apodaca v. Oregon*, 406 U.S. 404, 410-12 (1972); *Johnson v.*
12 *Louisiana*, 406 U.S. 356, 359-63 (1972). In addition, due process does not require an
13 instruction that the jury unanimously agree about which piece of evidence supports each
14 charge. The Supreme Court has held that "different jurors may be persuaded by different
15 pieces of evidence, even when they agree upon the bottom line. Plainly there is no general
16 requirement that the jury reach agreement on the preliminary factual issues which underlie
17 the verdict." *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackman, J, concurring);
18 see also *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991). Accordingly, the state court's
19 rejection of petitioner's unanimity claim on state law grounds cannot be considered a
20 violation of federal due process. Petitioner is not entitled to federal habeas relief on this
21 claim.

22 **III. Sufficiency of the Evidence**

23 California Penal Code § 4501.5 provides that "[e]very person confined in a state
24 prison of this state who commits a battery upon the person of any individual who is not
25 himself a person confined therein shall be guilty of a felony" Petitioner claims that the
26 evidence was insufficient to prove that he was confined in a California state prison at the
27 time of the offense.

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1 The Due Process Clause "protects the accused against conviction except upon proof
2 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
3 charged." *In re Winship*, 397 U.S. 358, 364 (1970). A state prisoner who alleges that the
4 evidence in support of his state conviction cannot be fairly characterized as sufficient to
5 have led a rational trier of fact to find guilt beyond a reasonable doubt therefore states a
6 constitutional claim which, if proven, entitles him to federal habeas relief. *Jackson v.*
7 *Virginia*, 443 U.S. 307, 321, 324 (1979).

8 A federal court reviewing collaterally a state court conviction does not determine
9 whether the evidence established guilt beyond a reasonable doubt. *Id.* at 318-19; *Payne v.*
10 *Borg*, 982 F.2d 335, 338 (9th Cir. 1992). It determines only "whether, after viewing the
11 evidence in the light most favorable to the prosecution, *any* rational trier of fact could have
12 found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S.
13 at 319. The court should take into consideration all of the evidence presented at trial.
14 *LaMere v. Slaughter*, 458 F.3d 878, 882 (9th Cir. 2006). If confronted by a record that
15 supports conflicting inferences, the court "must presume – even if it does not affirmatively
16 appear in the record – that the trier of fact resolved any such conflicts in favor of the
17 prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. A jury's
18 credibility determinations are entitled to near-total deference. *Bruce v. Terhune*, 376 F.3d
19 950, 957 (9th Cir. 2004). Except in the most exceptional of circumstances, *Jackson* does
20 not permit a federal habeas court to revisit credibility determinations. *Id.* at 957-58.

21 After 28 U.S.C. § 2254(d), a federal habeas court applies the standards of *Jackson*
22 with an additional layer of deference. *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir.
23 2005). The court must ask whether the operative state court decision "reflected an
24 'unreasonable application of' *Jackson* and *Winship* to the facts of the case." *Id.* at 1275
25 (quoting 28 U.S.C. § 2254(d)(1)).

26 The California Court of Appeal rejected petitioner's insufficient evidence claim,
27 finding that "[t]he jurors could logically conclude, from the stipulation that defendant was an
28 inmate at the Salinas Valley State Prison and from the evidence that Simons worked at

1 Salinas Valley State Prison, the incident occurred 'within the state prison,' and Simons was
2 wearing a 'California Department of Corrections medical smock,' that defendant Black was
3 confined in a California state prison rather than in a state prison of some other state."

4 Resp't Ex. 6 at 8.

5 This decision did not reflect an "unreasonable application of" *Jackson* and *Winship*.
6 See *Juan H.*, 408 F.3d at 1274. It is true that the prosecution presented no direct evidence
7 showing that Salinas Valley State Prison is a California state prison. But a federal habeas
8 court evaluating an insufficient evidence claim must take into consideration "all of the
9 evidence presented at trial," see *LaMere*, 458 F.3d at 882, and must "view[] the record in
10 the light most favorable to the prosecution," see *Jackson*, 443 U.S. at 319. From the
11 testimony that the victim was employed at Salinas Valley State Prison, Resp't Ex. 2 at 26,
12 that petitioner was an inmate at Salinas Valley State Prison, *id.* at 41, 55, and that the
13 victim was wearing a California Department of Corrections smock the day the incident
14 occurred, *id.* at 40, "any rational trier of fact" could have found beyond a reasonable doubt
15 that petitioner was "confined in a state prison of this state." See *Jackson*, 443 U.S. at 319;
16 § 4501.5. Petitioner is not entitled to federal habeas relief on his insufficient evidence
17 claim.

18 **IV. Right to Confrontation and Against Self-Incrimination**

19 Petitioner claims that he was denied due process because the trial court failed to
20 advise him of his right to confrontation and against self-incrimination before accepting his
21 stipulation to his two prior convictions for assault with intent to commit rape.

22 The right to confrontation applies when sentencing is dependent upon a new finding
23 of fact that was not an element of the offense for which the defendant was convicted. See
24 *Specht v. Patterson*, 386 U.S. 605, 609-10 (1967). Therefore, confrontation applies when a
25 defendant has been charged with a sentence enhancement which requires proof of the fact
26 of a prior conviction. See *Camillo v. Armontrout*, 938 F.2d 879, 880 (8th Cir. 1991).

27 The admission to a prior offense for sentencing purposes is the functional equivalent
28 of a guilty plea and must comport with the same protective measures imposed on the

1 acceptance of a guilty plea. *Bernath v. Craven*, 506 F.2d 1244, 1245 (9th Cir. 1974). The
2 long-standing test for determining the validity of a guilty plea is "whether the plea
3 represents a voluntary and intelligent choice among the alternative courses of action open
4 to the defendant." *Parke v. Raley*, 506 U.S. 20, 29 (1992) (quoting *North Carolina v.*
5 *Alford*, 400 U.S. 25, 31 (1970)). Determining whether the plea was voluntary and intelligent
6 requires a review of "all of the relevant circumstances surrounding it." *Brady v. United*
7 *States*, 397 U.S. 742, 749 (1970). The totality of the circumstances includes "both the
8 defendant's subjective state of mind and the constitutional acceptability of the external
9 forces inducing the guilty plea." *Doe v. Woodford*, 508 F.3d 563, 570 (9th Cir. 2007)
10 (internal quotations and citations omitted).

11 The California Court of Appeal concluded that "[t]he record in this case affirmatively
12 demonstrates that the plea was voluntary and intelligent under the totality of
13 circumstances." Resp't Ex. 6 at 12. The court cited the fact that petitioner opted to testify
14 on his own behalf during the trial, admitted to the jury on cross-examination that he suffered
15 two prior convictions for assault with intent to commit rape, observed his own counsel
16 cross-examine the prosecution's chief witness, requested a court trial on the three strikes
17 allegation, and was represented by counsel at the court trial. *Id.* at 11-12. Moreover, the
18 appellate court cited the strong factual basis for the stipulation in the prosecution's exhibits,
19 which were in the process of being admitted into evidence when petitioner agreed to
20 stipulate. *Id.* at 12.

21 The court of appeal's conclusion was neither contrary to, nor an unreasonable
22 application of, clearly established United States Supreme Court authority. See 28 U.S.C. §
23 2254(d). The circumstances surrounding petitioner's plea suggest that it represented a
24 voluntary and intelligent choice among the alternative courses of action open to him. See
25 *Brady*, 397 U.S. at 749; *Parke*, 506 U.S. at 29. First of all, the record indicates that
26 petitioner knew that he had a right to confront witnesses on the issue of his prior
27 convictions. The trial judge told petitioner that he had "a right to a jury trial in which 12
28 jurors would listen to the evidence concerning your prior convictions or special allegations

1 pursuant to Penal Code Section 1170.12(c)(2)." Resp't Ex. 2 at 8. Petitioner chose instead
2 to "have a Court trial on the truthfulness and the proof concerning the prior convictions." *Id.*
3 This description of the court trial as examining "the truthfulness and the proof" of the priors
4 must have indicated to petitioner that, despite having waived his right to a jury, he would
5 still have the opportunity to challenge the prosecution's evidence and present his own
6 proof.

7 The record also indicates that petitioner knew or should have known that admitting
8 the priors would have three strikes consequences. At the beginning of the jury trial, the
9 court informed petitioner that the amended information alleging two "prior serious or violent
10 felonies . . . enhances the potential punishment in this particular case . . . to a life sentence
11 with a 25-year minimum." *Id.* at 5. Petitioner acknowledge that he understood. *Id.* Later,
12 during the separate court trial on the priors, the prosecutor referred to petitioner's earlier
13 convictions as "strike priors" and informed the court that both qualified "as prior strikes
14 pursuant to the three strikes law." *Id.* at 504. Petitioner agreed to stipulate shortly after the
15 prosecutor made this statement. *Id.* at 505.

16 Additionally, the record suggests that petitioner made the decision to stipulate only
17 after appraising the weight of the evidence against him. The prosecutor was in the process
18 of entering certified abstracts of both prior convictions into evidence when defense counsel
19 informed the court of petitioner's decision. *Id.* at 504-05. Petitioner has not pointed to any
20 evidence or arguments that he would have used to challenge this proof if he had been
21 directly informed of his right to confrontation and against self-incrimination. In fact, his own
22 testimony on the witness stand corroborated the prosecution's evidence. On direct
23 examination, he stated that he had been imprisoned twice before for assault. *Id.* at 55. On
24 cross-examination, he admitted that both assaults were specifically assault with intent to
25 commit rape and that neither assault was accidental. *Id.* at 58.

26 On this record, the California Court of Appeal reasonably concluded that petitioner's
27 plea represented a voluntary and intelligent choice among the alternative courses of action
28 open to petitioner. See 28 U.S.C. § 2254(d); *Parke*, 506 U.S. at 29. Petitioner is not

entitled to habeas relief on this claim.

V. Cruel and Unusual Punishment

Petitioner claims that his sentence of twenty-five years to life constitutes cruel and unusual punishment. The Eighth Amendment to the United States Constitution provides that there "shall not be . . . cruel and unusual punishment inflicted." U.S. Const. amend. VIII. "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Ewing v. California*, 538 U.S. 11, 23 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)); see also *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("A gross disproportionality principle is applicable to sentences for terms of years."). The Eighth Amendment does not preclude a state from making a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime, as may occur under a recidivist sentencing statute. *Ewing*, 538 U.S. at 25, 29-30. In determining whether a sentence is grossly disproportionate under a such a statute, the court looks to whether the "extreme sentence is justified by the gravity of [the individual's] most recent offense and criminal history." *Ramirez v. Castro*, 365 F.3d 755, 768 (9th Cir. 2004).

In *Andrade*, the Supreme Court upheld a Three Strikes sentence of two consecutive twenty-five-to-life terms for a recidivist convicted of stealing approximately \$150 worth of videotapes. *Andrade*, 538 U.S. at 66, 77. Andrade had a criminal history of petty theft, burglary, and transportation of marijuana. *Id.* at 66. Similarly, in *Ewing*, the Court upheld a three strikes sentence of twenty-five years to life for a repeat felon convicted of felony grand theft of three golf clubs worth nearly \$1,200. *Ewing*, 538 U.S. at 18-19, 30-31. Ewing had a criminal history of theft, battery, burglary, possession of drug paraphernalia, illegal firearm possession, robbery, and trespass. *Id.* at 18-19. By contrast, the Ninth Circuit in *Ramirez* held that a Three Strikes sentence of twenty-five years to life on petty theft with prior conviction was grossly disproportionate to the crime. *Ramirez*, 365 F.3d at 767. Ramirez's prior criminal history consisted of two convictions for second-degree

1 robbery obtained through a single guilty plea, for which his total sentence was one year in
2 county jail and three years of probation. *Id.* at 768. The robberies were "nonviolent"
3 shoplifting crimes in which the "force" used was when a third party drove the getaway car
4 over the foot of a grocery store security guard and when Ramirez pushed a K-mart security
5 guard out of his way as he fled the store. *Id.*

6 Here, petitioner was convicted of battery by a prisoner on a non-confined person, a
7 crime arguably more serious than the thefts in *Andrade* and *Ewing*. In determining whether
8 a sentence is grossly disproportionate under a recidivist sentencing statute, however,
9 courts look not only at the most recent offense, but also at the petitioner's criminal history.
10 *Ramirez*, 365 F.3d at 768. Petitioner's criminal history is extensive. As a juvenile, he was
11 on Juvenile Probation for truancy, running away from home, and two residential burglaries,
12 and was committed to the California Youth Authority. Resp't Ex. 1 (Clerk's Transcript) at
13 72. As an adult, he committed five felonies and three misdemeanors. *Id.* at 72-73; Resp't
14 Ex. 2 at 505-06. The felonies that served as his first two strikes were separate incidents of
15 assault with intent to commit rape, a much more serious crime than the nonviolent
16 shoplifting priors in *Ramirez*. See Resp't Ex. 2 at 505-06; *Ramirez*, 365 F.3d at 768.
17 Petitioner also has a history of poor performance on probation and parole. See Resp't Ex.
18 1 at 73.

19 During his current prison term, petitioner has continued to misbehave. Between
20 1991 and 1999, he received fourteen 115 rule violations, two of which were for sexual
21 misconduct in the presence of a female correctional officer. *Id.* at 71-72. Petitioner's
22 probation report notes that Salinas Valley State Prison officials "believe [petitioner] has a
23 pattern of sexual misconduct, and consider him to be 'a problem' due to his prior record,
24 previous 115s, and the instant offense." *Id.* at 75-76.

25 That neither petitioner's CYA commitment, his multiple prison commitments, nor the
26 various punishments he has received for 115 violations deterred him from committing the
27 current offense supports the state appellate court's conclusion that petitioner's "sentence
28 does not give rise to an inference of gross proportionality." Resp't Ex. 6 at 21. The state

1 court's rejection of petitioner's Eighth Amendment claim was therefore not contrary to, nor
2 an unreasonable application of, clearly established Supreme Court authority. See 28
3 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

4 **VI. Incomplete Appellate Record**

5 The appellate record in this case does not include written jury instructions. See
6 Resp't Ex. 1 at 1-37. The clerk was unable to locate them. Resp't Ex. 1 Vol. II
7 (Supplemental Clerk's Transcript) at 8. Petitioner claims that the state's omission of the
8 written instructions deprived him of his right to appeal and to effective assistance of
9 appellate counsel.

10 To satisfy the due process requirements of the Fourteenth Amendment, the state
11 must provide a defendant with a "record of sufficient completeness" to permit "proper
12 consideration of [the defendant's] claims" and "adequate and effective appellate review."
13 See *Mayer v. Chicago*, 404 U.S. 189, 193-94 (1971); *Draper v. Washington*, 372 U.S. 487,
14 499 (1963); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). In *Madera v. Risley*, 885 F.2d 646
15 (9th Cir. 1989), the court adopted two criteria as relevant to the determination of need for
16 the missing record: (1) the value of the transcript to the defendant and (2) the availability of
17 alternative devices which would fulfill the same function. *Id.* at 648 (quoting *Britt v. North*
18 *Carolina*, 404 U.S. 226, 227 & n.2 (1971)). A habeas petitioner also must establish
19 prejudice from the lack of recordation to be entitled to habeas corpus relief. See *id.* at 649.

20 The California Court of Appeal found that petitioner "failed to show that the appellate
21 record was inadequate to permit meaningful appellate review." Resp't Ex. 6 at 25. The
22 court noted that the record does not establish that the jury actually considered the written
23 instructions in its deliberations. *Id.* at 22. Although the trial judge told the jury that the jury
24 instructions would be made available in written form if the jury so requested, see Resp't Ex.
25 2 at 251, the jury never made such a request. The appellate court also noted that petitioner
26 failed to show that the certified reporter's transcript of the oral instructions was an
27 inadequate substitute for the written instructions, Resp't Ex. 6 at 22, pointing out that it was
28 able to determine the merits of all issues raised on appeal, *id.* at 25. Finally, the court

1 concluded that petitioner failed to show prejudice. *Id.*

2 The court of appeal's rejection of petitioner's claim was neither contrary to, nor an
3 unreasonable application of, clearly established Supreme Court authority. See 28 U.S.C. §
4 2254(d). Under the first *Madera* factor, the "value" of the written jury instructions to
5 petitioner's case appears small. See *Madera*, 885 F.2d at 648. As the court of appeal
6 noted, there is no evidence that the jury actually considered the written instructions during
7 its deliberations. It is therefore unlikely that petitioner would have been able to make a
8 strong claim on appeal based on the written instructions. Under the second *Madera* factor,
9 petitioner has failed to show that the certified transcript of the oral instructions do not "fulfill
10 the same function" as the written instructions. See *Madera*, 885 F.2d at 648. He has not
11 claimed, for example, that the transcript of the oral instructions or the oral instructions
12 themselves were incomplete or inaccurate. For essentially the same reasons, petitioner
13 has failed to show prejudice. See *id.* at 649. Petitioner is not entitled to habeas relief on
14 this claim.

15 CONCLUSION

16 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The
17 clerk shall close the file.

18 **IT IS SO ORDERED.**

19 Dated: September 30, 2008.



PHYLLIS J. HAMILTON
United States District Judge